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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 346

UNION BANK & TRUST COMPANY, PETITIONER,

vs.

R. C. PHELPS, INDIVIDUALLY AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(37,043)



( )

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[fol. 1]

IN CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

UNION BANK & TRUST COMPANY, Plaintiff,

versus

R. C. PHELPS, Individually, and as Tax Collector of Montgomery County, Alabama, Defendant

COMPLAINT—Filed March 7, 1932

Count One

The plaintiff, Union Bank & Trust Company, claims of the defendant, R. C. Phelps, individually, and as Tax Collector of Montgomery County, Alabama, the sum of $2,521.69 Dollars and alleges:

(1) Plaintiff is a state banking corporation organized and existing under the laws of the State of Alabama with its principal and only place of business in the City of Montgomery, Alabama, and is and, at the times herein mentioned, was engaged in a general commercial and savings bank business in the conduct of which plaintiff receives and accepts deposits from persons, firms, associations and corporations and makes loans to persons, firms, associations and corporations with real estate and personal property as security and without security, and purchases and deals in real estate mortgages and notes and purchases and deals in bonds, notes and other securities and obligations of the United States, of Alabama and other states, of municipalities and other governmental subdivisions and of private corporations and others;

(2) That heretofore on the 23 day of July, 1931, taxes amounting to $2,484.70 Dollars were assessed by the tax officials of Montgomery County, Alabama, against the plaintiff on the shares of its capital stock for the tax year beginning October 1, 1930, and ending September 30, 1931, the value of said shares of capital stock as entered for assessment being $124,235.00 Dollars; and that in arriving at the assessed value of such shares the sum at which the

real estate and the improvements thereon and the furniture and fixtures belonging to the plaintiff were returned and assessed for taxation for said tax year was deducted from the aggregate value of said shares; that the said assess-
[fol. 2] ment of the shares of capital stock of the plaintiff was made and so entered under the provisions of Section 6 of an Act adopted by the Legislature of Alabama of 1923, approved August 22, 1923, (Laws of Alabama of 1923, page 152, at pages 161, 162);

(3) That there are located in the City of Montgomery, Alabama, and in the County of Montgomery, Alabama, and elsewhere in this State, building and loan associations, mortgage companies or corporations, companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate, industrial loan companies or corporations, and insurance companies or corporations and other private corporations, associations and individuals who were, during the years 1930, 1931 and 1932, and who are now, engaged in the carrying on of their said businesses in actual and substantial competition with the business of national and state banks located in the City of Montgomery, Alabama, and elsewhere in this State and in competition with plaintiff bank by making loans, purchasing and dealing in real estate mortgages and notes, and purchasing and dealing in bonds, notes and other securities and obligations of the United States, of Alabama and other states, of municipalities and other governmental subdivisions and of private corporations and others, and thus and otherwise employing moneyed capital in such actual and substantial competition and not merely for personal investment;

(4) That during the years 1930, 1931 and 1932 there were and are now located in said City of Montgomery, Alabama, national banks engaged in the general commercial and savings bank business and receiving deposits from persons, firms, associations and corporations and making loans to persons, firms, associations or corporations with real estate and personal property as security and without security and purchasing and dealing in real estate mortgages and notes and purchasing and dealing in bonds and other obligations of this State and other States and of the United States and bonds, notes, and other securities and

obligations of said State and other states and of the United States and of municipalities and other governmental subdivisions and of private corporations and others; that said national banks were and are engaged in actual and substantial competition with plaintiff bank;

(5) That the State of Alabama has by statutes now and at the times herein mentioned in effect, or otherwise, left [fol. 3] untaxed or exempted from taxation, or has taxed at a lesser rate of taxation, shares of capital stock and/or property and/or moneyed capital of building and loan associations mortgage companies or corporations, companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations and insurance companies and the capital stock and/or property and/or moneyed capital of other private corporations, associations and individuals in actual and substantial competition with the business of national banks and state banks, including plaintiff;

(6) That the Attorney General of Alabama rendered an opinion to this defendant dated January 29, 1932, to the effect that shares of capital stock in national banks located in Montgomery, Alabama, the same city in which plaintiff is located and does business, can not be taxed under the provisions of Section 6 of the said Act adopted by the Legislature of Alabama in 1923 for the reason that said statute is void and ineffective insofar as it attempts to levy a tax on shares of capital stock of said national banks because said statute is violative of Section 5219 of the Revised Statutes of the United States, which contain the following provisions:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax such associations on their net income or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others,

except as hereinafter provided in subdivision (c) of this cause.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or *ne*gaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

A copy of said opinion of the Attorney General of Alabama is hereto attached, marked Exhibit "A", and made a part hereof; that this defendant and the other tax officials in said [fol. 4] County and said State are making no efforts and do not intend to collect and can not lawfully collect the tax attempted to be imposed under the provisions of Section 6 of said statute on shares of capital stock of the national banks located in the City of Montgomery, Alabama;

(7) That it has been judicially determined by the United States District Courts in this State that the shares of capital stock of national banks located in certain cities of this State, to-wit, Dothan, Alabama, Selma, Alabama, and Troy, Alabama, can not be legally taxed under Section 6 of said Act, approved August 22, 1923, for the reason that moneyed capital in the hands of citizens of Alabama within the meaning of Section 5219 of the Revised Statutes of the United States in substantial and actual competition with the business of national banks located in the said cities is taxed at a lesser rate of taxation than the tax levied under the provisions of Section 6 of said Act approved August 22, 1923, or left untaxed or exempted from such taxation;

(8) That the said statute under which the said assessment was made against the shares of capital stock of plaintiff is and was at the times herein mentioned unconstitutional and void and violates Section 217 of the Constitution of Alabama which provides that "property of private corporations, associations and individuals of this State shall forever be taxed at the same rate" in that (a) the State of Alabama has by other statutes now in effect left untaxed or ex-

pressly exempted from taxation or has taxed at a lesser rate of taxation shares of capital stock and/or property of building and loan associations, mortgage companies or corporations, companies or corporations making loans on real estate or purchasing mortgages, or mortgage notes on real estate, and industrial loan companies or corporations, insurance companies and the shares of capital stock and/or property and/or moneyed capital of private corporations, associations and individuals in this State and that the Legislature of Alabama, in enacting said statutes or in failing to tax the shares of stock and/or property and/or moneyed capital of such other private corporations and associations and individuals has unlawfully and illegally discriminated against the plaintiff and in favor of such other private corporations, associations, and individuals; (b) the State of Alabama has failed to levy any valid and legal tax on the shares of capital stock of national banks located in Mont- [fol. 5] gomery County and elsewhere in the State of Alabama, which shares of stock are the same species of property as are the shares of capital stock of plaintiff;

(9) That the said statute under which the said assessment was made against the shares of capital stock of plaintiff is unconstitutional and void and violates the provisions of the Fourteenth Amendment to the Constitution of the United States of America, viz: Section 1 thereof which provides as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

in that (a) the State of Alabama has by other statutes now in effect left untaxed or expressly exempted from taxation or has taxed at a lesser rate of taxation shares of capital stock and/or property of building and loan associations, mortgage companies or corporations, companies or corporations making loans on real estate or purchasing mortgages, or mortgage notes on real estate, and industrial loan companies or corporations, insurance companies and the shares of capital stock and/or property and/or moneyed

capital of private corporations, associations and individuals in this State and that the Legislature of Alabama, in enacting said statutes or in failing to tax the shares of stock and/or property and/or moneyed capital of such other private corporations and associations and individuals has unlawfully and illegally discriminated against the plaintiff and in favor of such other private corporations, associations, and individuals; (b) the State of Alabama has failed to levy any valid and legal tax on the shares of capital stock of national banks located in Montgomery County and elsewhere in the State of Alabama, which shares of stock are the same species of property as are the shares of capital stock of plaintiff; (c) the State of Alabama has by the provisions of its laws for the assessment, levy and collection of such taxes on the shares of capital stock of this plaintiff and other banks located within the State provided no due process of law for the taking of the property of the owners of said shares to satisfy the claim for such taxes;

(10) That notwithstanding the unconstitutionality of [fol. 6] said statute and the invalidity of the said assessment against the plaintiff's said shares of capital stock, the defendant in his capacity as Tax Collector of Montgomery County, Alabama, and under color of his office has made demand for the payment of the taxes under said assessment and has threatened immediately to advertise and sell said shares of capital stock and take all other steps necessary for the collection of said alleged taxes as provided by the laws of Alabama. A true copy of said demand for the payment of said taxes made by the defendant on the plaintiff is hereto attached, marked Exhibit B, and made a part hereof; that the advertising and selling of said shares of capital stock of plaintiff would have worked irremediable and irreparable damage to plaintiff; that it had no other remedy save to pay the amount claimed by the defendant as taxes and to thereafter bring an action against this defendant to recover the amount of said payment so illegally enacted by the defendant from the plaintiff;

(11) That plaintiff, after said demand had been served on it for payment of said amount to the defendant, did, on to-wit, the 7th day of March, 1932, pay under duress to the

defendant the said sum of $2,521.69 Dollars claimed by him as taxes and interest due to be paid by plaintiff on its said shares of capital stock and that at the time of said payment the plaintiff protested in writing the payment of said amount, a copy of which protest is hereto attached, marked Exhibit C, and made a part hereof, and also gave notice to the defendant that it would enter suit against him to recover back the amount of said payment, together with the legal interest thereon and that said amount so paid by the plaintiff to the defendant is now in the hands of the defendant.

Count Two

The plaintiff, Union Bank & Trust Company, a banking corporation organized and existing under the laws of the State of Alabama and located in the City of Montgomery, Alabama, claims of the defendant, R. C. Phelps, individually, and as Tax Collector of Montgomery County, Alabama, the sum of $2,521.69 Dollars, together with interest thereon from the 7th day of March, 1932, for that, the tax officials of Montgomery County, Alabama, acting under and as authorized by Section 6 of an Act adopted by the Legislature of Alabama of 1923 and approved August 22, 1923, (Laws of Alabama of 1923, pages 161, 162 did heretofore assess the shares of plaintiff for taxation for the tax year [fol. 7] beginning October 1, 1930, and ending September 30, 1931, at the assessed value of $124,235.00 Dollars; that the taxes upon said property as so assessed amounted to the sum of $2,484.70 Dollars; that said taxes became due and payable on the 1st day of October, 1931; that thereafter the defendant, in his capacity as Tax Collector of Montgomery County, Alabama, and under color of his office, made demand upon plaintiff for the payment of said taxes as so assessed, and did threaten to immediately advertise and sell said shares and take any and all other steps authorized by the laws of the State of Alabama that he might deem necessary to collect said taxes, a copy of said demand being hereto attached, marked Exhibit B, and made a part hereof; that the plaintiff, as a result of said demand and threats and by reason of duress, did pay under protest to the defendant, as such Tax Collector, the said amount of taxes so demanded of it, to-wit, $2,521.69 Dollars, on the 7th day of March, 1932, a copy of said protest being

hereto attached, marked Exhibit C, and made a part hereof; that at the time of said payment the plaintiff did notify the defendant that it would enter suit against him to recover back the said amount so paid, together with legal interest thereon, and that said amount so paid to the defendant is now in the hands of the defendant as such Tax Collector.

That Section 5219 of the Revised Statutes of the United States, which authorizes states to tax the shares of national banking associations, provides, among other things, as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

[fol. 8] Plaintiff further alleges that it was doing a general banking business in Montgomery County, Alabama, during the said year beginning October 1, 1930, and ending September 30, 1931, and employed moneyed capital in connection therewith; that during said time there were national banking associations doing business in Montgomery County,

Alabama, and elsewhere in Alabama; that during said time there were individuals, corporations and associations doing business in Montgomery County and elsewhere in Alabama which employed moneyed capital not merely for personal investment coming into competition with the business of national banking associations and coming into competition with the business of plaintiff, and that under the laws of Alabama in force and effect during said time the shares and/or moneyed capital of said individuals, corporations and associations were not taxed or were taxed at a lesser rate than the tax imposed by said laws upon the shares of national banking associations or upon the shares and/or the moneyed capital of the plaintiff.

Plaintiff further avers that the said shares of plaintiff so taxed as aforesaid are property of the same class or species as the shares of national banking associations and as the shares and/or moneyed capital of the aforesaid individuals, corporations and associations so doing business during said time in Montgomery County and elsewhere in Alabama.

Plaintiff further avers that though the State of Alabama was authorized and permitted and had power under the statutes of the United States to impose a tax upon the shares of said national banking associations so doing business in Montgomery County and elsewhere in Alabama not at a greater rate than assessed upon other moneyed capital in the hands of individual citizens of Alabama coming into competition with the business of said national banking associations, nevertheless said Section 6 of said Act adopted by the Legislature of Alabama of 1923, under which the said tax was assessed and paid by plaintiff and which purports to impose a tax upon the shares of national banking associations, does not legally impose a tax upon the shares of said national banking associations.

Plaintiff further avers that the United States District Courts in this State have held and decreed in certain cases heretofore filed therein by national banking associations located in the Cities of Dothan, Selma and Troy, Alabama, [fol. 9] that said Section 6 of said Act adopted by the Legislature of Alabama of 1923 and approved August 22, 1923, does not legally impose a tax upon the shares of said national banking associations, and that the Attorney General of Alabama heretofore rendered an opinion to the defendant herein to the same effect in respect to national banking

associations located in the City of Montgomery, Alabama, and plaintiff further avers that by reason of the aforesaid decrees and opinion the defendant and other tax officials in said County and State have not collected and have made no effort to collect and do not intend to make any effort to collect any tax sought to be imposed by said Section of said Act upon the shares of national banking associations located in the City of Montgomery, Alabama.

Plaintiff further avers that said Section 6 of said Act adopted by the Legislature of Alabama of 1923 violates the Fourteenth Amendment to the Constitution of the United States and is unconstitutional and void.

Plaintiff further avers that said Section 6 of said Act violates the Fourteenth Amendment to the Constitution of the United States in that it imposes a tax on the shares of national banking associations at a greater rate than is assessed upon moneyed capital in the hands of individual citizens of Alabama coming into competition with the business of national banking associations; and is unconstitutional and void.

Plaintiff further avers that said Section 6 of said Act violates the Fourteenth Amendment to the Constitution of the United States in that it imposes a tax on the shares of plaintiff and fails to legally impose a tax upon the shares of national banking associations and is unconstitutional and void.

Plaintiff further avers that said Section 6 of said Act violates the Fourteenth Amendment to the Constitution of the United States in that it imposes a tax upon the shares of plaintiff and that under the laws of Alabama in force and effect during the aforesaid year beginning October 1st, 1930, and ending September 30th, 1931, the shares and/or moneyed capital of said individuals, corporations and associations doing business during said time in Montgomery County and elsewhere in Alabama were not taxed or were taxed at a lesser rate than the tax imposed by said Section 6 of said Act upon the shares of plaintiff and is unconstitu-
[fol. 10] tional and void.

Plaintiff further avers that said Section 6 violates Section 217 of the Constitution of Alabama and is unconstitutional and void.

Plaintiff further avers that said Section 6 violates Section 217 of the Constitution of Alabama and is unconstitutional and void in this:

(a) That the shares of private corporations, associations and individuals of Alabama are not taxed at the same rate thereunder.

(b) That under the laws of Alabama in force and effect during said year beginning October 1st, 1930, and ending September 30th, 1931, the moneyed capital of private corporations, associations and individuals of Alabama was not taxed or was taxed at a lesser rate than the moneyed capital of plaintiff.

(c) That under the laws of Alabama in force and effect during said year beginning October 1st, 1930, and ending September 30th, 1931, the shares of corporations and associations of Alabama were not taxed or were taxed at a lesser rate than the said shares of plaintiff.

(d) That under the laws of Alabama in force and effect during said year beginning October 1st, 1930, and ending September 30th, 1931, the shares of national banking associations doing business in Alabama were not legally taxed.

Plaintiff further avers that said Section 6 of said Act violates Section 211 of the Constitution of Alabama and is unconstitutional and void.

Plaintiff further avers that said Section 6 of said Act violates Section 211 of the Constitution of Alabama for the reasons and in the particulars set forth in subdivisions numbered (a) to (d) hereof, and is unconstitutional and void.

Count Three

The plaintiff claims of the defendant the sum of $2,521.69 Dollars due from him by account on the 7th day of March, 1932, which sum of money with interest thereon is still due and unpaid.

[fol. 11] Count Four

The plaintiff claims of the defendant the sum of $2,521.69 Dollars due from him for money on the 7th day of March, 1932, received by the defendant to the use of the plaintiff, which sum of money, together with interest thereon, is still due and unpaid. Hence this suit.

William B. White, John S. Coleman, Attorneys for Plaintiff. Bradley, Baldwin, All & White, of Counsel.

I, R. C. Phelps, the defendant in the above styled suit, do hereby accept service of a copy of the summons and complaint in said suit, this 7th day of March, 1932.

R. C. Phelps, Individually and as Tax Collector of Montgomery County, Alabama.

EXHIBIT "A" TO COMPLAINT

Jan. 29, 1932.

Hon. R. C. Phelps,
Tax Collector, Montgomery County,
Montgomery, Alabama:

Tax Collector of Montgomery County, under facts set out by him, is not required to collect tax on shares of capital stock of national banks in Montgomery, under the ruling of the Federal Court construing Section 5219 of the Revised Statutes of the United States as amended.

Tax Collector may legally accept the amount of State and County tax tendered on its physical property and is not required to collect the ad valorem assessment on its shares of capital stock.

Opinion by the Attorney General

MY DEAR SIR: I have you- letter of January 6th, 1932, in which you set out a certain state of facts which you say exists in respect to the national banks doing business in Montgomery, Alabama. The state of facts set out by you is as follows:

"(1) The State and County tax imposed on its shares is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State coming in competition with its business as a National Bank;

"(2) The tax on its shares is in excess of what is assessed upon other moneyed capital in the hands of Building & Loan Associations, Industrial Banks, and domestic insurance cor- [fol. 12] porations of Alabama, located in and doing business in Montgomery, Alabama, all of which lend money here in Montgomery to the extent of hundreds of thousands of dollars, in competition with the business of this National Bank;

"(3) Building and Loan Associations, Industrial Loan Companies and Corporations, Industrial Banks, which engage in business in Montgomery, Alabama, and lend money in competition to The First National Bank of Montgomery to the extent of hundreds of thousands of dollars, are exempted from the assessment and payment of ad valorem taxes on its shares;

"(4) Mortgage Companies and corporations making loans on real estate in Montgomery, Alabama, and purchasing mortgages and mortgage notes on real estate in Montgomery, Alabama, to the extent of many thousands of dollars, in competition with the business conducted by The First National Bank of Montgomery, are exempted from this tax, which is applicable to the shares of stock of National Banks;

"(5) Insurance Companies organized under the laws of Alabama, and doing business in Montgomery, Alabama, and lending money on mortgages, and purchasing State and municipal bonds in competition with the business of The First National Bank of Montgomery, Alabama, to the extent of thousands of dollars, are given exemptions in ad valorem stock or share assessment and taxation not given to The First National Bank of Montgomery;

"(6) That in the conduct of its business as a National Bank, and in lending money, and purchasing notes, and bonds, and stocks, other individuals, persons and corporations engaged in like business, and in competition with said National Bank in Montgomery, Alabama, to the extent of thousands of dollars, are not assessed and taxed an ad valorem tax on such moneyed capital which comes into competition with the business of said National Bank;

"(7) A large amount of property of like character to that of the shares of stock of said National Bank, viz: money loaned, bills and notes discounted, securities bought and sold by a large number of persons, firms and corporations engaged in such a business to the extent of thousands of dollars, is not assessed for taxation, but is exempted."

You also state that you know from your experience as Tax Collector that some, if not all, of the foregoing alleged and asserted exemptions, and alleged discriminations, exist,

and that you believe these facts to be substantially true, and that these conditions exist in the taxing district in which the National Banks in Montgomery are located.

You inquire as follows:

"(1) Can I require The First National Bank of Montgomery to pay the State and County tax assessed against its share and capital stock?"

"(2) Can I legally accept the amount of the State and County tax heretofore tendered me by it on its ad valorem assessment on its real estate, and not collect the ad valorem assessment on its shares or capital stock?"

[fol. 13] I am of the opinion that the facts set out in your letter of January 6th bring the Montgomery National banks within the same category of the Selma National Bank and the National Bank at Dothan, and the First Farmers and Merchants National Bank of Troy. In the case of the banks outside of Montgomery before mentioned, the United States District Court held that such banks are not liable for the tax on its shares of capital stock. This ruling of the United States District Court is in harmony with repeated rulings of the Supreme Court of the United States:

Iowa-Des Moines National Bank vs. Bennett, decided by U. S. Supreme Court Dec. 14, 1931, 76 L. Ed. Advance Sheets, Vol. 4;

First National Bank vs. Anderson, 269 U. S. 341; 70 L. Ed. 295;

Public National Bank of New York vs. Keating, 47 F. (2d), 561; affirmed U. S. Sup. Court Dec. 1931, 76 L. Ed., —, Advance Sheets, Vol. 4;

First National Bank vs. Hartford, 273 U. S. 548; 71 L. Ed. 767;

Minnesota vs. First National Bank, 273 U. S. 561; 71 L. Ed. 774;

Boise National Bank vs. Ada County, 48 Fed. (2d) 222;

Commercial National Bank vs. Franklin County, 45 Fed. (2d) 213;

Roberts, etc., vs. American National Bank (Fla.) 121 So., 554.

In view of this situation I think it would be useless for you to contend for the tax assessed against the shares of capital stock of National Banks in Montgomery.

Yours truly, (Sgd.) Thos. E. Knight, Attorney General.

EXHIBIT "B" TO COMPLAINT

Montgomery, Alabama, March 7th, 1932.

To Union Bank & Trust Company, Montgomery, Alabama:

Take notice that I hereby make demand upon you for payment forthwith of $3,259.53 Dollars, with interest thereon from January 1st, 1932, state and county ad valorem taxes shown by the records in my office to be due by your Bank and delinquent since January 1st, 1932, on account of the real estate and tangible personal property of your Bank and the shares of your Bank's capital stock in accordance with the assessment thereof for the tax year October 1, 1930, to September 30, 1931.

If you do not pay this amount forthwith, I shall proceed at once to levy upon sufficient assets of your Bank in the manner prescribed by the laws of Alabama to satisfy, in my opinion, the amount of such ad valorem taxes past due by you and delinquent as aforesaid with respect to said real estate and tangible personal property, to give notice of sale thereof, and sell the same for the satisfaction and payment of that part of said taxes and interest and fees thereon applicable to said real estate and tangible personal property and to take the steps provided by the laws of Alabama to subject to levy and sale all of the shares of your Bank's capital stock to satisfy the amount of such taxes due on account of such shares and after taking such steps, I shall forthwith proceed to advertise for sale and sell said [fol. 14] shares of capital stock in the manner prescribed by the laws of Alabama for the satisfaction of said taxes and interest and fees thereon with respect to that part of such taxes applicable to said shares.

Unless payment is made forthwith in accordance with this demand, I will proceed as aforesaid at once.

R. C. Phelps, Tax Collector of Montgomery County, Alabama.

EXHIBIT "C" TO COMPLAINT

Montgomery, Alabama, March 7th, 1932.

To R. C. Phelps, Tax Collector of Montgomery County, Alabama:

DEAR SIR: Payment by the accompanying check for $737.84 Dollars, representing State of Alabama and County of Montgomery ad valorem taxes on the real estate and tangible personal property of the undersigned, plus interest thereon at the rate of eight per cent — annum from January 1st, 1932, is hereby made to you, admitting the liability of the undersigned for said amount of taxes.

Payment by the accompanying check for $2,521.69 Dollars, being the amount of State of Alabama and County of Montgomery ad valorem taxes, with interest thereon from January 1, 1932, assessed for the tax year beginning October 1, 1930, and ending September 30, 1931, against the undersigned under Section 6 of the General Acts of Alabama of 1923, page 152, with respect to the shares of the capital stock of the undersigned Bank is made pursuant to your notice and demand therefor dated March 7th, 1932, and is made with a denial of the validity of said assessment or any part thereof and with a denial of the right of the State of Alabama and the County of Montgomery or any other authority to make said assessment or any part thereof, and with a claim by the undersigned for the immediate refund of this payment on the ground that said taxes have been erroneously, illegally, invalidly and unconstitutionally assessed and Under protest in order to avoid the collection of said taxes and interest thereon by levy and sale of said shares of capital stock as threatened by you in your notice and demand.

The undersigned claims that said assessment of said shares of capital stock and the collection of said tax thereon by you are erroneous in toto and illegally made and wrongfully exacted and collected from the undersigned, and that if you proceed as threatened in your said notice and demand dated March 7th, 1932, the undersigned will undergo irremediable and irreparable injury both to its reputation as a banking institution and in other respects and its stockholders will undergo irremediable and irreparable injury in the sale of their said shares and in the injury to the reputation of the undersigned Bank.

Notice is hereby given you that the undersigned will forthwith commence an action at law against you for the recovery of the amount so herewith and hereby paid under protest.

The specific reasons for the protest of the undersigned hereby made are

(1) Under Section 5219 of the Revised Statutes of the United States, the shares of national banks located in the State of Alabama sought to be taxed by said Section 6 of the General Acts of Alabama of 1923, page 152, may not be taxed by reason of the fact that throughout the years 1930 and 1931 and the year 1932 to date, there were in the State of Alabama many hundreds of thousands of dollars of moneyed capital in the hands of citizens of Alabama, within the meaning of said Section 5219 of the Revised Statutes of the United States, in substantial and actual competition with the business of national banks located in [fol. 15] the State of Alabama but taxed at a lesser rate of taxation than that sought to be assessed and levied against the shares of national banks, or expressly untaxed or exempted wholly from taxation; that the same is true in the principal cities in Alabama, including the City of Montgomery, Alabama, in which the undersigned Bank is located and in which there are also located two national banks, and in the State of Alabama and in the City and County of Montgomery, Alabama, throughout said period there were in active operation mortgage companies, industrial loan companies, investment security dealers, building and loan associations, insurance companies and corporations and individuals engaged in financial businesses lending money on real and personal security and without security, dealing in investment securities and otherwise using moneyed capital in competition with the business of national banks and not merely for personal investment, which moneyed capital so used is, and was during said period, taxed at a lesser rate than the shares of national bank in the State of Alabama or the two national banks in the City and County of Montgomery, Alabama, or expressly untaxed or exempted wholly from taxation.

(2) In various district courts of the United States for districts within the State of Alabama, it has been decided

in duly adjudicated proceedings that the shares of certain national banks located within the State of Alabama could not be legally taxed for the tax year beginning October 1, 1930, and ending September 30, 1931, for the purposes of state, county or city ad valorem taxes under the laws of Alabama and that said laws violated said Section 5219 of the Revised Statutes of the United States. The time for appeal from said United States District Court decisions or from some of them has elapsed and no appeals have been taken therefrom.

(3) The Attorney General of the State of Alabama has rendered formal opinion in writing that the shares of the national banks located in the City and County of Montgomery, Alabama, could not, for the state tax year beginning October 1, 1930, and ending September 30, 1931, be legally taxed for state, county or city ad valorem taxation and that such taxes claimed thereon cannot be legally collected by reason of the violation by the laws of the State of Alabama of the provisions of Section 5219 of the Revised Statutes of the United States.

(4) Under the decisions of the Supreme Court of Alabama the shares of incorporated banks and banking associations incorporated under the laws of the State of Alabama and incorporated under the laws of the United States are the same species of property for ad valorem taxation.

(5) By reason of the foregoing and by reason of the fact that such moneyed capital taxed at a lesser rate or expressly untaxed or exempted wholly from taxation is, and has been during the years 1930, 1931 and 1932 to date, in substantial and actual competition with the business of the undersigned Bank in the City and County of Montgomery and in the State of Alabama, the purported assesment and the collection of taxes on account thereof on the shares of the capital stock of the undersigned Bank violated the provisions of the Fourteenth Amendment to the Constitution of the United States in that it denied the undersigned Bank and its shareholders the equal protection of the laws by seeking to exact taxation from the undersigned Bank and from its shareholders while not validly, effectively and legally exacting the same taxation from owners and holders of shares of capital stock of national banks located within the State of Alabama and within the

State and County of Montgomery and of the shares of other classes of corporations in substantial and actual competition with the business of the undersigned Bank in the State of Alabama and in the City and County of Montgomery, and of other moneyed capital in substantial and actual competition with the business of the undersigned Bank in the State of Alabama and the City and County of Montgomery, and the forcible collection thereof under the threats made by you in said notice and demand deprived the share-holders of the undersigned Bank and the undersigned Bank of their property without due process of law.

(6) For the same reasons and by reason of the same facts, said assessment and forcible collection violated the provisions of Section 217 of the Constitution of Alabama in that the statute under which said assessment was made violated, as aforesaid, the provisions of Section 5219 of the Revised Statutes of the United States and in that the laws of Alabama with reference to the assessment of taxes on shares of corporations located in the State of Alabama [fol. 16] and with reference to the assessment of taxes on moneyed capital in competition with the business of the undersigned Bank assess and levy taxes thereon at a lesser rate than that under which said collection has been forcibly made from the undersigned Bank, or are left untaxed or expressly exempted wholly from taxation, whereas said Section 217 of the Constitution of Alabama requires that "the property of private corporations, associations and individuals of this State shall forever be taxed at the same rate."

(7) The State of Alabama having sought and attempted by said Section 6, General Acts of 1923, page 152, to tax the shares of national banks located within the State of Alabama in compliance with Section 5219 of the Revised Statutes of the United States as thereby permitted, but having failed so to do for the reasons and matters aforesaid, and having sought and attempted by said Section 6, General Acts of 1923, page 152, to likewise tax the shares of banks and banking associations incorporated under the laws of the State of Alabama, but having failed to validly and legally levy a tax upon the shares of such national banks for the reasons hereinabove set forth, said Section 6, General Acts of 1923, page 152, became void and of no

legal effect as to the shares of banking institutions incorporated under the laws of the State of Alabama, including the undersigned Bank, leaving the same, together with the shares of national banks, expressly untaxed and not subject to taxation.

(8) The assessment on account of which you demanded payment of said amount hereby paid under protest was illegal and void and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(9) The assessment on account of which you demanded payment of said amount hereby paid under protest was illegal and void and in violation of Section 217 of the Constitution of Alabama.

(10) The law under which said assessment was made was when the assessment was made, and is, void and of no effect and violated Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 217 of the Constitution of Alabama.

(11) The amount of taxes, interest and fees forcibly collected by you from the undersigned Bank has been erroneously, illegally, invalidly, and unconstitutionally assessed and collected.

You are hereby notified that any distribution you may make of the payment of the amount hereby paid under protest as aforesaid will be at your own peril and that you will be held to respond personally to judgment in said action at law which will be commenced forthwith by the undersigned Bank.

Union Bank & Trust Company, by Grover Keyton,
Its Secretary.

[fol. 17] In Circuit Court of Montgomery County

Demurrers to Counts One and Two of Complaint—Filed March 17, 1932

Comes the defendant in the above styled cause and demurs to Counts 1 and 2 of the complaint herein filed and for grounds of demurrer, separately and severally, says:

1. That it affirmatively appears from the complaint that the plaintiff is not entitled to the relief sought.

2. That the complaint sets up no facts entitling plaintiff to judgment.

3. That the complaint affirmatively shows that the assessment against the shares of plaintiff was regularly and legally made and that taxes paid thereon were due.

4. That from aught that appears plaintiff was liable for the amount of the taxes paid and herein sought to be refunded.

5. That the complaint affirmatively shows that the assessment on the shares of plaintiff Bank was regularly made, that no protest or appeal from such assessment was ever made, and that the taxes paid and here sought to be recovered were due and payable, and plaintiff was liable therefor.

6. That Section 6 of the Act of the Legislature of 1923, Acts 1923, pages 161 and 162, is a valid and constitutional enactment.

7. That no facts are set up showing wherein plaintiff's legal rights have been invaded or its due process of law denied by any unconstitutional provision of said Section 6 of the Act of the Legislature approved August 22, 1923.

8. That said Section 6 is not violative of Section 217 of the Constitution of Alabama as averred.

9. That said Section 6 is not violative of Section 211 of the Constitution of Alabama as averred.

10. That this Court judicially knows that under the laws of the State of Alabama shares of national and state banks are taxable at the same rate and any immunity therefrom which national banks may enjoy is by virtue of the Act of Congress and not from the State of Alabama or its tax enforcement agencies.

11. That the complaint shows on its face that so far as plaintiff is concerned, said Section 6 of the Act approved August 22, 1923, is valid and constitutional.

[fol. 18] 12. That the averments that Section 6 of the Act approved August 22, 1923, is violative of Sections 217 and 211 of the Constitution of Alabama are mere conclusions of the pleader.

13. That from aught that appears the Legislature of Alabama has the right and power to exempt from taxation the species of property set out in paragraph 5, count 1 of the complaint.

14. That the averment that the failure to tax the shares of national banks constitutes an illegal discrimination against plaintiff is a mere conclusion of the pleader.

15. The averment that the State of Alabama has by other statutes left untaxed or expressly exempted from taxation other moneyed capital and that this action unlawfully and illegally discriminates against plaintiff so as to render the taxation of shares of plaintiff void is a mere conclusion of the pleader.

16. This Court judicially knows that it is the Legislature's prerogative to select its own subjects of taxation and it so doing is not violative of any Section of the State Constitution or the 14th Amendment to the Federal Constitution.

17. That this Court judicially knows that Section 6 of the Act approved August 22, 1923, is not a classification for taxation purposes, but provides a method of assessment and administration.

Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General, Attorneys for Defendant.

In Circuit Court of Montgomery County

Pleas—Filed March 17, 1932

Comes the defendant and files the following pleas to counts 1 and 2 of the complaint.

1. That he is not indebted to plaintiff in the manner and form alleged.

2. That the defendant ought not recover the amount sued for, for the following reasons:

A. The assessment on which these taxes were paid was regularly made, plaintiff was given due notice of the same

[fol. 19] and made no protest or appeal, or was heard in any wise to complain until demand was made upon it for payment of the taxes due, and defendant avers that such protest and this suit come too late.

B. That there is no classified property taxation system in the State of Alabama and that the arrangement of state and national banks in one Section as appears in Section 6 of the Act approved August 22, 1923, is not a classification for taxation purposes but is a method of assessment. That the Legislature cannot and did not by such procedure classify property nor levy different rates of taxation but taxed all property declared by it to be taxable at the same rate. Defendant admits that the shares of certain national banks presumably competing with plaintiff have escaped share taxation, but defendant avers that this is by virtue of the limitations put upon the State's power to tax them by the Congress of the United States, and that by the law of the State of Alabama they are taxed at the same rate as plaintiff. And Defendant avers that the states have no power to tax national banks except as given it by Congress and that the failure or refusal of Congress to give plenary power to the states in the matter of share taxation, cannot relieve the defendant of its liability for such taxes and that the failure to tax the shares of national banks because of congressional limitations does not constitute a discrimination in violation of the State or Federal Constitutions.

C. Defendant further avers that the Legislature has the right and power to select its own subjects of taxation and to exempt such as it sees fit. That the exemption of shares of mortgage companies and the other species of property named in the complaint is the legitimate prerogative and its exercise does not constitute the taxation of property at a different rate and contrary to Sections 211 and 217 of the State Constitution. Defendant further avers that such exemptions do not render the taxation of plaintiff's shares void and unconstitutional.

Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General, Defendant's Attorneys.

[fol. 20] IN CIRCUIT COURT OF MONTGOMERY COUNTY

PLAINTIFF'S DEMURRERS TO DEFENDANT'S SPECIAL PLEAS—
Filed March 17, 1932

Now comes the plaintiff in the above styled cause and demurs to each plea of the defendant filed therein, separately and severally, and as grounds of said demurrer sets down and assigns, separately and severally, the following:

(1) For that no sufficient facts are stated in said plea.

(2) For that said plea tenders an immaterial issue.

(3) For that no facts are stated in said plea which constitute a sufficient answer to the cause of action stated in each count set out in plaintiff's complaint.

(4) For that the facts set out in said plea do not constitute an estoppel against this plaintiff from maintaining the causes of action stated in the counts of its complaint.

(5) For that it does not appear that there was any duty on the part of the plaintiff to make any protest of or appeal from the said assessment.

(6) For that it does not appear to whom the plaintiff should have made any protest after said assessment was made.

(7) For no sufficient facts are stated in said plea to sustain the conclusion that this suit was filed too late.

(8) For that it appears there was no duty on the part of the plaintiff to make any protest or to take any appeal from said assessment.

(9) For that it does not appear that plaintiff was under any duty to complain to anyone of said assessment.

(10) For that no sufficient facts are stated in said plea in bar of the maintenance of said cause of action stated in each of plaintiff's said counts.

(11) For that it appears from the allegations stated in said plea that the State of Alabama could not validly tax the shares of capital stock of the plaintiff without taxing the shares of capital stock of national banking associations doing business in Alabama.

(12) For that no facts are stated in said plea which show that the State of Alabama has legally taxed the shares of capital stock of the plaintiff.

(13) For that it does not appear from the allegations of said plea that the State of Alabama has validly taxed the [fol. 21] shares of capital stock of plaintiff bank.

(14) For that no facts are stated in said plea which show that the defendant was authorized to collect from the plaintiff the amount of taxes which the plaintiff seeks to recover in this action.

(15) For that no facts are stated in said plea to show that the defendant could legally exact from the plaintiff the amount of money he collected from plaintiff under protest as taxes on its shares of capital stock.

(16) For that no facts are stated in said plea which bar a recovery by the plaintiff of the amounts sued for in its complaint.

(17) For that no facts are stated in said plea to sustain the conclusion that there has been no unconstitutional discrimination against the plaintiff in the attempted efforts by the State to tax the shares of capital stock of plaintiff bank.

(18) For that no sufficient facts are stated in said plea to excuse the State of Alabama in not taxing shares of capital stock of national banks and shares of capital stock of the plaintiff at the same rate.

(19) For that it affirmatively appears from the allegations of said plea that the State of Alabama has not validly taxed the shares of capital stock of national banking associations doing business in this State.

(20) For that it does not appear from the allegations of said plea that the State of Alabama can validly tax the shares of capital stock of plaintiff bank and fail to tax the shares of capital stock of national banking associations doing business in the State of Alabama.

(21) For that it does not appear that the State of Alabama can exempt from taxation shares of capital stock of mortgage companies and other species of property men-

tioned in said plea and validity tax the share of capital stock of the plaintiff.

(22) For that it affirmatively appears that the State of Alabama in atempting to tax shares of capital stock of the plaintiff bank has violated Section 211 of the Constitution of the State of Alabama.

(23) For that it affirmatively appears that the State of Alabama in attempting to tax shares of capital stock of the plaintiff has violated Section 1 of the 14th Amendment to the Constitution of the United States.

[fol. 22] (24) For that no sufficient facts are stated in said plea to sustain the conclusion that the exemptions from taxation stated in said plea do not render the taxation of plaintiff's shares of capital stock void and unconstitutional.

(25) For that legal conclusions are stated in said plea which are not sustained by the facts set out in said plea.

(26) For that no facts are set out in said plea which show that the State of Alabama could collect an ad valorem tax on the shares of the capital stock of plaintiff for the tax year beginning October 1st, 1930, and ending September 30th, 1931.

(27) Said plea neither confesses and avoids the allegations contained in the count to which it is pleaded nor sets up any fact in bar thereof.

(28) For that no facts are stated in said plea which would operated as an estoppel to the maintenance of the cause of action stated in each of the counts of plaintiff's complaint to which said plea is interposed.

(29) For that said plea is argumentative.

(30) For that all of the facts stated in said plea are available to the defendant under the plea of the general issue.

William B. White, John S. Coleman, Counsel for Plaintiff. Bradley, Baldwin, All & White, of Counsel.

[fol. 23] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

JUDGMENT—March 23, 1932

This day came the parties and by their attorneys and the Defendant's demurrer to the complaint being argued by counsel and understood by the Court, and being considered by the Court, it is considered, ordered and adjudged by the Court that the Defendant's demurrer to the complaint be and the same is hereby overruled. The Plaintiff's demurrer to the Defendant's special pleas 2A, B and C being argued by counsel and understood by the Court, and being considered by the Court, it is considered, ordered and adjudged by the Court that the Plaintiff's demurrer to the Defendant's special pleas 2A, B and C be and the same is hereby sustained. And issue being joined on the Defendant's plea of general issue and after hearing the evidence, the Court being of the opinion, it is considered and ordered by the Court, and it is the judgment of the Court, that judgment be and the same is hereby rendered in favor of the plaintiff and against the defendant for the sum of Two thousand, five hundred twenty-one and 69/100ths dollars ($2,521.69).

It is therefore considered, ordered and adjudged by the Court that the plaintiff have and recover of the defendant the said sum of Two thousand, five hundred twenty-one and 69/100ths dollars ($2,521.69), together with the costs in this behalf expended, and for all of which execution may issue.

[fol. 24] IN CIRCUIT COURT OF MONTGOMERY COUNTY

Bill of Exceptions—Filed March 29, 1932

Be it remembered that at the said term of said Court on to-wit, the 23rd day of March, 1932, present the Honorable Walter B. Jones, Judge of said Court, and the Court being duly called in the case of Union Bank and Trust Company, Plaintiff, vs. R. C. Phelps, individually and as Tax Collector of Montgomery County, Defendant, the following among other proceedings were had:

Defendant demurred to Counts 1 and 2 of the complaint as appears by his demurrers numbered 1 to 17, filed in said cause, which demurrers were overruled by the Court and the Defendant then and there duly and legally excepted. Defendant thereupon filed plea 1, the general issue, and special plea #2, to the complaint. Plaintiff demurred to said special plea of Defendant as appears by his demurrers numbered 1 to 30 as filed in said cause, which demurrers were sustained by the Court and to which action of the Court the Defendant then and there duly and legally excepted.

Thereupon the following agreed statement of facts was introduced:

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

AGREED STATEMENT OF FACTS

The plaintiff, by its attorneys of record, Messrs. Bradley, Baldwin, All & White, and the defendant, by his attorney of record, Thomas E. Knight, Attorney General of the State of Alabama and Frontis H. Moore, assistant Attorney General of Alabama, hereby agree and stipulate that the following are the facts in the above entitled cause:

First. Plaintiff is a State banking corporation duly organized and existing now and at the times hereinafter mentioned as a State Bank under and pursuant to the laws of the State of Alabama, which is, and was at the times hereinafter mentioned, located and conducting its principal business and had its principal and only office in the City of Montgomery and in the County of Montgomery, Alabama. Plaintiff, in the conduct of its business as a State Bank and pursuant to its charter and [fol. 25] statutory rights as a State Bank, carried on, during the times hereinafter mentioned, at said place of business in said City and County of Montgomery, a general commercial and savings bank business. It received and accepted deposits from persons, firms, associations and corporations residing or located and doing business in said City and County and also in other cities and counties in the State of Alabama and elsewhere. It made loans to

persons, firms, associations and corporations residing or located and doing business in said City and County and also in other cities and counties in the State of Alabama and elsewhere on real estate and personal property security, and without security. It purchased and dealt in and with real estate mortgages, bonds of the State of Alabama and of the United States and other States, and bonds and other obligations and securities of governmental subdivisions of said State and of the United States and other States and of private corporations and others. It carried on generally the same businesses as the businesses conducted by National Banks located in said City, County and State except the issue of currency.

Second. Defendant is the Tax Collector for the County of Montgomery in the State of Alabama.

Third. On Dec. 16, 1930, plaintiff made and filed with the Tax Assessor of the County of Montgomery, Alabama, a return of its real estate and tangible personal property. On the same date plaintiff made and filed with the said Tax Assessor a return of its shares of capital stock.

Fourth. On July 23, 1931, the Tax Assessor of the County of Montgomery, Alabama, listed the value for ad valorem taxation for State and County purposes of said real estate and tangible personal property at $36,290.00 Dollars. No protest or complaint was made thereto by plaintiff, and on account of said real estate and tangible personal property there has been entered upon the final assessment roll of the County of Montgomery, Alabama, for the tax period beginning October 1, 1930, and ending September 30, 1931, an assessment of $725.80 Dollars.

Fifth. On July 23, 1931, the Tax Assessor of the County of Montgomery, Alabama, listed the value for ad valorem taxation for State and County purposes of said shares of [fol. 26] plaintiff's capital stock at $124,235.00 Dollars. No protest or complaint or objection to the value so listed was then, or at any time prior to the completion of the final assessment roll of said County, made by the plaintiff or any of its shareholders, and on account of said shares of plaintiff's capital stock there has been entered upon the final assessment roll of the County of Montgomery, Alabama, for the tax period beginning October 1, 1930, and

ending September 30, 1931, an assessment of $2,484.70 Dollars.

Sixth. On March 7, 1932, the defendant made demand on plaintiff for payment of a total of $3,259.53 Dollars of taxes on account of the foregoing assessments, with interest thereon from January 1, 1932, to date. Said demand was made in writing and a true copy of said writing is hereto attached, marked "Exhibit C".

Seventh. Following said demand plaintiff made to defendant payment of the amount of the taxes and interest thereon from January 1, 1932, due on account of said assessment of plaintiff's real estate and tangible personal property by check in the amount of $737.84 Dollars, admitting plaintiff's liability for that amount, but under protest in writing plaintiff made to defendant payment of the amount of the taxes and interest thereon claimed by defendant to be due on account of said assessment of the shares of plaintiff's capital stock by check expressly stated to be given under protest, in the amount of $2,521.69 Dollars, denying plaintiff's liability for said amount and the liability of plaintiff's shareholders for said amount, said payment being accompanied by written protest, a true copy of which is hereto attached, marked "Exhibit D."

Eighth. In the State of Alabama during 1930, 1931 and 1932 to date, there were many hundreds of thousands of dollars of moneyed capital in substantial and actual competition with the business of both National Banks and State Banks located in the County of Montgomery and in the State of Alabama other than moneyed capital representing merely personal investments and not made in competition with such banking business, used and employed in the business of mortgage companies, industrial loan companies, investment security dealers and companies, building and loan associations, insurance companies and corporations, and individuals engaged in financial businesses, all of which loaned money on real and personal security and without security, some of which dealt in investment securities and otherwise used moneyed capital in substan- [fol. 27] tial and actual competition with the business of both National Banks and State Banks, which moneyed capital is, and was during said period, taxed at a lesser

rate in the sense of burden imposed, than the rate of taxation sought by Section 6 of the General Acts of 1923, page 152, to be exacted upon the shares of National Banks and the shares of State Banks located within the State of Alabama, or is, and was during said period, expressly untaxed or exempted wholly from taxation.

Ninth. During said years 1930, 1931 and 1932 to date, there were and are building and loan associations, industrial loan companies and corporations, and industrial banks which engaged in business in the City of Montgomery, Montgomery County, Alabama, and loaned money in substantial and actual competition with the National Banks located in said City and County of Montgomery and in substantial and actual competition with the plaintiff State Bank to the extent of hundreds of thousands of dollars, the shares of capital stock and capital of which were, during said period, exempted from the assessment and payment of ad valorem taxes and were left by the laws of Alabama entirely untaxed, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period there were likewise mortgage companies and corporations making loans on real estate in the City of Montgomery and County of Montgomery and purchasing mortgages and mortgage notes on real estate in said City and County to the extent of many thousands of dollars in substantial and actual competition with the businesses conducted by the National Banks located in the City of Montgomery, Montgomery County, Alabama, and the plaintiff bank, which were exempted by the laws of Alabama from any tax upon their shares of capital stock or capital or left by the laws of Alabama wholly untaxed for ad valorem tax purposes with respect to their shares of capital stock, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, there were insurance companies organized under the laws of Alabama and doing business in said City of Montgomery, Alabama, lending money on mortgages and purchasing state, municipal and other bonds in substantially the same manner as state and national banks located in Alabama, to the extent of many thousands of dollars, which were entitled to certain credits or exemptions in computation of the tax assessed upon their shares

[fol. 28] of capital stock or capital by the laws of the State of Alabama for ad valorem tax purposes, which credits or exemptions were not accorded under the laws of Alabama in computation of assessments on the shares of capital stock or capital of said National Banks and State Banks, including said shares of plaintiff bank. During the said period, in the conduct of plaintiff's business and in the conduct of the businesses of the National Banks located in said City and County and in lending money and purchasing notes, bonds, stocks and securities, plaintiff bank and said National Banks found in actual and substantial competition with them other individuals, persons, firms, associations and corporations engaged in like business or businesses and using moneyed capital therein to the extent of many thousands of dollars, which moneyed capital was not assessed or taxed for ad valorem taxes under the laws of Alabama and was either expressly exempted by said laws or left untaxed by said laws, or was taxed, at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, a large amount of property of like character to that of the shares of capital stock and capital of plaintiff bank and said National Banks, in the form of money loaned, bills and notes discounted, securities bought and sold, by a large number of persons, firms and corporations engaged in like businesses to the businesses of said National Banks and State Banks, including plaintiff bank, to the extent of many thousands of dollars in actual and substantial competition with the business of said National Banks and plaintiff bank was not assessed for taxation but was exempted by the laws of Alabama from ad valorem taxation or left untaxed by said laws, or was taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks.

Tenth. During the time herein mentioned there were located and doing business in said City and County of Montgomery two National Banks and in the State of Alabama many National Banks which carried on the businesses of receiving and accepting deposits from persons, firms, associations and corporations residing or located and doing business in said City and County and also in other cities and counties in the State of Alabama and elsewhere, making loans to persons, firms, associations and corporations

residing or located and doing business in said City and County of Montgomery and also in other cities and counties in the State of Alabama and elsewhere on real estate and [fol. 29] personal property security, and without security, and purchasing and dealing in and with real estate mortgages, bonds of the State of Alabama and of the United States and other States, and bonds and other obligations and securities of governmental subdivisions of said State of Alabama, the United States and other States, and of private corporations and others and engaged generally in the business of commercial and savings banks. The said businesses carried on by said National Banks were and are in substantial and actual competition with the businesses carried on and transacted by the plaintiff during the time herein mentioned.

Eleventh. That many of the corporations hereinabove mentioned are corporations organized and existing under the laws of Alabama and that during the times herein mentioned thousands of the shares of the capital stocks of said Alabama corporations were held and owned by the shareholders thereof.

Twelfth. Under date of January 29, 1932, the Attorney General of Alabama rendered to the defendant herein an opinion in writing, a true copy of which is hereto attached, marked "Exhibit E".

Thirteenth. In a number of adjudicated cases District Courts of the United States for the Alabama Districts have decided, and entered judgment accordingly, that the shares of capital stock of certain National Banks located in the State of Alabama are not legally taxed under Section 6 of said Act of the Legislature of 1923 and cannot be legally taxed nuder the laws of Alabama in that said Section 6 of said Act violates the provisions of Section 5219 of the Revised Statutes of the United States, viz: The National Banks located in Dothan, Alabama, Selma, Alabama, and Troy, Alabama, and no appeals have been taken from said decisions or are intended to be taken. The time for appeal from the decisions with respect to said National Banks located in Dothan, Alabama, and Selma, Alabama, has expired.

Fourteenth. That the Tax Collector of Montgomery County, Alabama, has not collected and has made no effort to collect and has announced his intention to make no effort to collect any tax sought to be imposed by said Section 6 of said Act of the Legislature of 1923 upon the shares of National Banks located in the City of Montgomery during the aforesaid times.

[fol. 30] Fifteenth. The sum of $2,521.69 paid by plaintiff to defendant on account of the tax claimed by defendant to be due as taxes on plaintiff's said shares of capital stock for the tax year beginning October 1st, 1930, and ending September 30th, 1931, is now in the hands of the defendant.

William B. White, John S. Coleman, Attorneys for Plaintiff. Bradley, Baldwin, All & White, of Counsel. Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General of Alabama, Attorneys for Defendant.

Exhibit C to agreed statement of facts omitted; printed side page 13 ante.

[fols. 31 & 32] Exhibit D to agreed statement of facts omitted; printed side page 14 ante.

[fols. 33-35] Exhibit E to agreed statement of facts omitted; printed side page 11 ante.

[fol. 36] This was all the evidence in the case and the cause was thereupon submitted to the Court for final judgment.

The Court rendered judgment in favor of the Plaintiff in the sum of $2,521.69 together with costs, to which action and judgment of the Court the Defendant then and there duly and legally excepted.

Wherefore the said R. C. Phelps, Defendant in the above styled cause, prays that this be taken as his legal bill of

exceptions in said cause upon the same being duly signed according to law by his Honor, Walter B. Jones, Judge of the 15th Judicial Circuit, who presided in the trial of said cause.

Tendered this 29 day of March, 1932.

Walter B. Jones, Judge 15th Judicial Circuit.

Approved and filed this 29 day of March, 1932.

Walter B. Jones, Judge 15th Judicial Circuit.

In Circuit Court of Montgomery County

Notice and Security for Costs of Appeal—Filed March 26, 1932

Comes the defendant, R. C. Phelps, in the above styled cause and hereby appeals to the Supreme Court of Alabama from the judgment of the Circuit Court of Montgomery County rendered in said cause on the 23 day of March, 1932, in favor of the plaintiff.

Thos. E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General, Defendant's Attorneys.

We hereby acknowledge ourselves security for all costs of the foregoing appeal.

W. H. Stevens.

Approved this 26th day of March, 1932.

H. N. Hughes, Clerk.

[fol. 37] Citation, in usual form, showing service on John S. Coleman, omitted in printing.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 38] IN SUPREME COURT OF ALABAMA

R. C. PHELPS, Individually and as Tax Collector of Montgomery County, Alabama, Appellant,

vs.

UNION BANK & TRUST Co., Appellee

ASSIGNMENTS OF ERROR

Appeal from the Circuit Court of Montgomery County

Comes R. C. Phelps, Individually and as Tax Collector, Appellant in the above styled cause and assigns the following errors appearing in the transcript of the record of the court below, and for grounds of error assigns the following:

I. That the court below erred in overruling defendant's (Appellant here) demurrer to counts one and two of the original complaint. Tr. pages 17-18. Tr. page 23.

II. That the court below erred in overruling defendant's (Appellant) demurrer to counts 1 and 2 of the complaint, grounds 1 to 17, inclusive, separately and severally. Tr. P-. 17-18-23.

III. That the court below erred in overruling the defendant's (Appellant) demurrer to the complaint and counts 1 and 2 thereof as shown by grounds of demurrer numbered 1-17 inclusive, separately and severally (Tr. P-. 17-18-23).

IV. That the court below erred in overruling defendant's (Appellant) demurrer to counts 1 and 2 of the complaint and specifically, the court erred in overruling defendant's grounds of demurrer numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, separately and severally. Tr. P-. 17-18-23.

V. That the court below erred in sustaining plaintiff's (Appellee here) demurrer to special plea numbered 1-A-B-C of defendant (Appellant here). Tr. P-. 20-21-23.

VI. That the court below erred in sustaining plaintiff's (Appellee) demurrer to special plea 1-A-B-C of defendant (Appellant) and specifically erred in sustaining such de-

murrer on grounds numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 separately and severally (Tr. P-. 20-21-23).

VII. That the court below erred in and by its final judgment in rendering judgment in favor of the plaintiff (Appellee here). Tr. P. 23.

[fol. 39] VIII. The court below erred in and by its final judgment in rendering judgment in favor of plaintiff (Appellee) and in not rendering judgment in favor of defendant (Appellant). Tr. P. 23.

IX. That the court below erred in rendering final judgment in favor of plaintiff (Appellee) and in not rendering judgment in favor of defendant (Appellant) because:

Said judgment was contrary to the law in the case.

Said judgment was contrary to the evidence in the case.

Said judgment was contrary to the law and evidence in the case. Tr. P. 23.

Wherefore Appellant prays that said judgment of the circuit court of Montgomery county be reversed and judgment here rendered in favor of Appellant.

This April 7, 1932.

R. C. Phelps, Individually and as Tax Collector of Montgomery County, by Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Ass't Attoney General, His Attorneys.

To Union Bank & Trust Co., appellee, or to W. B. White, John S. Coleman, Bradley, Baldwin, All & White, its attorneys:

You will take notice of the foregoing assignments of error.

This April 7, 1932.

R. C. Phelps, Individually and as Tax Collector, Appellant, by Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Ass't Atty. Gen'l, His Attorneys.

[fol. 40] IN SUPREME COURT OF ALABAMA

[Title omitted]

ARGUMENT AND SUBMISSION—April 8, 1932

Come the parties, by attorneys, and argue and submit this cause for decision.

IN SUPREME COURT OF ALABAMA

[Title omitted]

JUDGMENT—May 19, 1932

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted, and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the judgment of the Circuit Court be reversed and annulled, and the cause remanded to the said Court for further proceedings therein.

It is also considered that the Appellee pay the costs of appeal of this Court and of the Circuit Court.

[fol. 41] IN SUPREME COURT OF ALABAMA

[Title omitted]

DOCKET ENTRY

June 1st, 1932.—Application for rehearing filed by Appellee.

IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER DENYING APPLICATION FOR REHEARING—June 16, 1932

It is ordered on rehearing that the judgment of the Court rendered on May 19th, 1932, reversing the judgment of the

Circuit Court and remanding the cause be set aside and vacated. Whereupon, the record and matters therein assigned for errors being argued and submitted, and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the judgment of the Circuit Court be reversed and annulled, and this Court proceeding to render the judgment the Circuit Court should have rendered, doth order and adjudge that there be judgment for the defendant, and that the defendant go hence, and have and recover of the plaintiff his costs in this behalf expended, for which execution may issue.

It is also considered that the appellee pay the costs of appeal of this Court and of the Circuit Court.

[fol. 42] IN SUPREME COURT OF ALABAMA

[Title omitted]

OPINION

Per CURIAM:

The inherent power of the State to collect taxes to raise revenue on property within its jurisdiction and on domestic concerns is an attribute of sovereignty residing in the Legislature, and so long as it does not impinge the limitations fixed by the Constitution, or trench upon the prerogatives of the National Government, or violate the guarantees of the Fourteenth Amendment of the Constitution of the United States, its powers are unlimited and unrestrained. This power is not a delegated power, but a power inherent in the State, essential to its life and continued existence.—Phœnix Carpet Co. v. The State, 118 Ala. 143; Ohio Oil [fol. 43] Company v. Conway, 281 U. S. 146 (159).

The power to tax the stock in banks of the United States,—agencies of the National Government, in the accomplishment of its constitutional purposes,—is not an inherent power residing in the State, but a power delegated by Congress. Such agencies cannot be taxed except by the consent of Congress.—Cooley's Const. Law (8th Ed.), Page 991.

In the exercise of this delegated power the Legislature must conform to the restrictions in the acts of Congress delegating this power, otherwise the effort of the Legislature to exercise this power is abortive and void.—Ward, Tax Collector v. First National Bank of Hartford, MS; Mercantile Bank v. New York, 121 U. S. 138.

The limitation on the power of the Legislature to levy a direct tax on property, found in §§211 and 217 of our Constitution, is a limitation on the inherent power of the State, and not on the power to tax delegated by the Federal statute. The limitation on this power is found in Section 5219 of the United States Revised Statutes.—Maguire v. Board of Revenue and Road Commissioners of Mobile County, 71 Ala. 401; Pollard v. The State, ex rel. Zuber, 65 Ala. 628.

Therefore, when the Legislature, in the exercise of the power delegated by the Federal statute efficaciously levies a tax on the stock of United States Banks, in conformity with the statute, such levy reflects the limitation embodied in the Constitution in respect to the levy on subjects of taxation within the inherent power of the State, and requires [fol. 44] substantial uniformity. Such was the case dealt with in State Bank v. Board of Revenue, 91 Ala. 217.

But where, as in the case at bar, the attempted exercise of the delegated power of taxation under the Federal statute is abortive, there is no basis for applying the limitation embodied in Section 217 of the Constitution to taxes levied in the exercise of the State's inherent power on domestic bank stock; therefore, the plaintiff was not entitled to recover.

We are in full accord with the minority view that there is "no semblance of justice in taxing the shares of State banks and excluding those of National banks." But we entertain the view the remedy for such injustice lies with the law-making power of the State and Federal Government, by amendment of the Federal statute, as now proposed by the pending bill in Congress, so as to permit the taxation of National banks in like manner and to like extent as State banks; and if this is not done, the Legislature should conform to the requirements of the Federal law. The result of such injustice in this particular instance does not justify a surrender of the inherent power of the sovereign state to tax its own subjects and exercise its own prerogatives.

Upon the question of taxation, the Legislature of this State had the power to make exemptions and classifications free from interference by the courts unless there results inequality, not only oppressive in its operation, but so glaring as that it can be judicially declared to be founded [fol. 45] on arbitrary and capricious principles, without the just semblance of reason. Subject to this limitation the legislative power to select proper subjects of taxation and to classify them upon principles which to them seem just, cannot be circumscribed by the courts. There must be, of necessity, left a liberal scope for the free exercise of this presumably wise discretion.—Moog v. Randolph, 77 Ala. 597.

Upon this well recognized principle the system of classification and exemption by the legislature as to moneyed capital is a matter resting within the law-making power, and is not such as to justify the interference by the court.

Like reasoning as outlined in this opinion leads to the conclusion that the State system of taxation here questioned violates no provision of the Fourteenth Amendment to the Constitution of the United States.—Ohio Oil Co. v. Conway, 281 U. S. 146.

The judgment of the circuit court is reversed and one here rendered for the defendant.

Reversed and rendered.

Gardner, Thomas, Brown and Knight, JJ., concur.
Anderson, C. J., Bouldin and Foster, JJ., dissent.

Bouldin, J. (dissenting):

Union Bank & Trust Company, a State banking corporation, paid under protest the ad valorem taxes assessed against its shareholders upon their shares of stock for the tax year ending September 30, 1931, and brought the present action against the Tax Collector to enforce a refund.

Broadly stated the theory of the suit is that by a course of legislation, exempting, or omitting as subjects of taxa- [fol. 46] tion, other moneyed capital, the tax structure of the State is such as to work a repeal of the statute subjecting shares of stock in State banks to ad valorem taxation. This by force of the uniformity provisions of our State Constitution. The Federal law dealing with the taxation of shares in National banks is brought under consideration

as affecting the status upon which our Constitution operates.

We take note, first, of the statutes and constitutional provisions involved.

Section 5219, United States Revised Statutes, reads:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

National banks being agencies or instrumentalities of the Federal Government in relation to its currency and fiscal affairs, the power of Congress to impose restrictions preventing discrimination by State tax laws against the holders of stock in such banks in favor of competing moneyed capital, has been long settled, and is unchallenged.

[fol. 47] "The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested."—Mercantile Bank v. New York, 121 U. S. Rep. p. 157.

"All taxes levied on property in this State shall be assessed in exact proportion to the value of such property."—Constitution of Alabama, Section 211.

"The property of private corporations, associations, and individuals of this State shall forever be taxed at the same rate."—Constitution of Alabama, Section 217.

In Mayor, &c., of Mobile v. Stonewall Insurance Company, 53 Ala. 570, this court considered a provision of the Constitution of 1868 to like effect as Section 217 of our present Constitution above quoted. That case dealt with a statute prescribing a different and lower rate of municipal taxation upon certain moneyed capital employed by corporations from that similarly employed by individual citizens. In an extended opinion by Chief Justice Brickell, among other things, the court declared:

"Invidious exemptions or discriminations, by which the property of an individual, or of a corporation, is relieved from bearing a just proportion of the common burden taxation is intended to discharge, or violative of the equality of right of the citizen, which is a fundamental principle of [fol. 48] our institutions. To prevent any exemption or discrimination in favor of corporations, to subject their property to the same rate of taxation to which the property of individuals of the same kind is subject, is the purpose of the constitutional provision, clearly expressed: 'The property of corporations now existing, or hereafter created, shall forever be subject to taxation, the same as property of individuals,' &c. * * * If property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on individuals. While the constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burthen, which is natural right and equity, is secured alike to the corporation and to the citizen."—53 Ala. pp. 579, 580, 581.

We note that, in the above case, it appearing that provision was made by law for assessment of such property, the court held the discriminatory provision invalid and subjected the property to the same rate as like property assessed to individuals.

In National Commercial Bank of Mobile v. Mayor, Aldermen & Common Council of Mobile, 62 Ala. 284, this court considered Section 5912 of United States Revised Statutes,

above quoted. A distinction was there drawn between the capital of a national bank and the shares as private property of the individual shareholder, quoting the following from Van Allen v. The Assessors (3 Wal. 573):

"'The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own.' 'The interest of the shareholder entitled him to participate in the net profits earned by the bank in the employment of its capital,' &c. 'This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to State taxation under the limitations prescribed.'"—62 Ala. 294.

[fol. 49] To like effect, see Sumter County v. The National Bank of Gainesville, 62 Ala. 464.

In State Bank v. Board of Revenue, 91 Ala. 217, the court considered the effect of Sections 211 and 217 of our Constitution (then Sections 1 and 6 of the Constitution of 1875) along with Section 5219 of United States Revised Statutes, and directly applied the same to ad valorem taxes upon the shares of State banks and national banks. The statute then in force, apparently out of desire to avoid a possible conflict with the Federal statute, permitted a deduction of the indebtedness of the shareholder in a national bank from the value of his shares, taxing only the residue, if any; while no such deduction was allowed in assessing the shares in the State banks.

Defining the effect of Section 211 and 217 of our Constitution, in an opinion by Chief Justice Stone, it was said:

"What we do decide is, that whenever the legislature levies a tax on property, the rate must be in exact proportion to the value of such property; and that if a tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate, whether it belongs to an individual, an association of persons, or to a private corporation. We mean by this, not only that, in this regard, natural persons, individuals or companies

stand on the same footing with private corporations, but also that each individual association, or private corporation, is, under our constitution, endowed with the same rights, and subject to the same burdens, as are enjoyed or suffered by every other natural person, association of persons, or private corporation. The following authorities render it unnecessary for us to go into the argument at greater length.—Mayor of Mobile v. Stonewall Ins. Co. 53 Ala. 570; State Auditor v. Jackson County, 65 Ala. 142; Maguire v. Board of Revenue, 71 Ala. 401. See, also, Nat. Commercial Bank v. Mayor, 62 Ala. 284; Sumter Co. v. Nat. Bank, Ib. 464; Perry Co. v. Railroad, 65 Ala. 391; Pollard v. State, ex rel., Ib. 628.

[fol. 50] "We need scarcely say that bank shares in a National bank, and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile. In assessing the one, our statute allows a deduction of the taxpayer's indebtedness, and taxes the surplus. In assessing the other, it allows no such deduction. We hold that this is a violation of section 6, Art. XI of Alabama's Constitution, and that the shareholders in State banks are entitled to the same deductions as the statute accords to the share-holders of National banks."—91 Ala. 223.

Following this decision, the legislature, in the Revenue Act of 1895, construed in Jefferson County Savings Bank v. Hewitt, 112 Ala. 546, sought to remedy the defects of the former statute; and the legislature of 1896 further amended same as appears in the Code of 1896, Section 3911, Subd. 8.

This statute, intended to conform to all the requirements of Section 5219 of the Revised Statutes of the United States, listed as part of the taxable property of the State, every share in State banks and National banks. It provided a method of ascertaining the value of the shares, deduction of assessed value of real estate, assessment of the residue against the shareholders, and payment of such tax by the bank.

This scheme of taxing the shares in both State and National banks has been in force and re-enacted from time to time until this date.—General Acts 1923, p. 161, Section 6.

Provision is also made for taxation of unincorporated banks on substantially a like basis.—Acts 1923, Section 5, p. 160.

[fol. 51] The same law of 1896 listed the shares in other corporations as part of the taxable property of the State, and provided the method of assessment and payment.—Code of 1896, Section 3911, Subd. 9. This general scheme as to shares in domestic corporations has been re-enacted from time to time.—Acts of 1923, p. 162, Section 8.

In the General Revenue Act of 1927, this statute of 1923 as to shares in domestic corporations, other than banks and banking associations, was re-enacted without change of substance, save in the matter of exceptions or exemptions.—Acts 1927, p. 166, Section 25.

The Act of 1923 excepted shares in building and loan associations. The Act of 1927 added as exceptions "mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations," and concludes with the following:

"Provided, however, that the provisions of this Act, shall not apply to the shares of stock of domestic or foreign mortgage companies or corporations whose chief business is making loans on real estate, or purchasing mortgages and mortgage notes on real estate; nor shall this Act apply to the shares of domestic or foreign industrial loan companies or corporations, it being hereby expressly enacted that all shares of stock of such domestic and foreign mortgage companies or corporations and domestic and foreign industrial loan companies or corporations, shall be exempted from assessment and the payment of ad valorem taxes."—Gen. Acts 1927, page 168.

[fol. 52] With this legislative situation before us, we proceed to consider the case made by the present record.

The cause was tried upon an agreed statement of facts. The eighth, ninth and eleventh paragraphs of agreed facts are as follows:

"Eighth. In the State of Alabama during 1930, 1931 and 1932 to date, there were many hundreds of thousands of dollars of moneyed capital in substantial and actual competition with the business of both National Banks and State

Banks located in the County of Montgomery and in the State of Alabama other than moneyed capital representing merely personal investments and not made in competition with such banking business, used and employed in the business of mortgage companies, industrial loan companies, investment security dealers and companies, building and loan associations, insurance companies and corporations, and individuals engaged in financial businesses, all of which loaned money on real and personal security and without security, some of which dealt in investment securities and otherwise used moneyed capital in substantial and actual competition with the business of both National Banks and State Banks, which moneyed capital is, and was during said period, taxed at a lesser rate in the sense of burden imposed, than the rate of taxation sought by Section 6 of the General Acts of 1923, page 152, to be exacted upon the shares of National Banks and the shares of State Banks located within the State of Alabama, or is, and was during said period, expressly untaxed or exempted wholly from taxation.

"Ninth. During said years 1930, 1931 and 1932 to date, there were and are building and loan associations, industrial loan companies and corporations, and industrial banks which engaged in business in the City of Montgomery, Montgomery County, Alabama, and loaned money in substantial and actual competition with the National Banks located in said City and County of Montgomery and in substantial and actual competition with the plaintiff State Bank to the extent of hundreds of thousands of dollars, the shares of capital stock and capital of which were, during said period, exempted from the assessment and payment of ad valorem taxes and were left by the laws of Alabama entirely untaxed, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period there were likewise mortgage companies and corporations making loans on real estate in the City of Montgomery and County of Montgomery and purchasing mortgages and mortgage notes on real estate in said City and County to [fol. 53] the extent of many thousands of dollars in substantial and actual competition with the businesses conducted by the National Banks located in the City of Montgomery, Montgomery County, Alabama, and the plaintiff

bank, which were exempted by the laws of Alabama from any tax upon their shares of capital stock or capital or left by the laws of Alabama wholly untaxed for ad valorem tax purposes with respect to their shares of capital stock, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, there were insurance companies organized under the laws of Alabama and doing business in said City of Montgomery, Alabama, lending money on mortgages and purchasing state, municipal and other bonds in substantially the same manner as state and national banks located in Alabama, to the extent of many thousands of dollars, which were entitled to certain credits or exemptions in computation of the tax assessed upon their shares of capital stock or capital by the laws of the State of Alabama for ad valorem tax purposes, which credits or exemptions were not accorded under the laws of Alabama in computation of assessments on the shares of capital stock or capital of said National Banks and State Banks, including said shares of plaintiff bank. During the said period, in the conduct of plaintiff's business and in the conduct of the businesses of the National Banks located in said City and county and in lending money and purchasing notes, bonds, stocks and securities, plaintiff bank and said National Banks found in actual and substantial competition with them other individuals, persons, firms, associations and corporations engaged in like business or businesses and using moneyed capital therein to the extent of many thousands of dollars, which moneyed capital was not assessed or taxed for ad valorem taxes under the laws of Alabama and was either expressly exempted by said laws or left untaxed by said laws, or was taxed, at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, a large amount of property of like character to that of the shares of capital stock and capital of plaintiff bank and said National Banks, in the form of money loaned, bills and notes discounted, securities bought and sold, by a large number of persons, firms and corporations engaged in like businesses to the businesses of said National Banks and State Banks, including plaintiff bank, to the extent of many thousands of dollars in actual and substantial competition with the business of said National Banks and plain-

tiff bank was not assessed for taxation but was exempted [fol. 54] by the laws of Alabama from ad valorem taxation or left untaxed by said laws, or was taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks."

* * * * * * *

"Eleventh. That many of the corporations hereinabove mentioned are corporations organized and existing under the laws of Alabama and that during the times herein mentioned thousands of the shares of the capital stocks of said Alabama corporations were held and owned by the shareholders thereof."

Further stipulations disclose, that National banks in certain cities in Alabama have, because of this discrimination in taxing moneyed capital, refused to pay the ad valorem tax assessed against their shareholders, and test cases have been finally adjudicated by the Federal Courts in Alabama in their favor; that the Tax Collector of Montgomery County has not collected, nor is he making any effort to collect, ad valorem taxes assessed against the shareholders of the National banks in the City of Montgomery.

This is pursuant to an opinion of the Attorney General rendered upon a request from the Tax Collector setting forth the untaxed competitive moneyed capital in substance as here agreed.

The appellant does not here contend that shares of National banks are now subject to the ad valorem tax in question. We deem it important, however, to determine the question on the law and facts without regard to the views of the Attorney General.

Without considering whether all the corporations and associations mentioned in the agreed facts as employing moneyed capital in the loan and investment features of [fol. 55] their businesses in competition with banks are tax free, or taxed at a lower rate in the sense of the burden imposed, we must hold that the record discloses substantial competition with both State and National banks on the part of corporations engaged in the loan and investment business, using and employing moneyed capital in such competitive business, which corporations or associations are

subject to the laws of Alabama relating to taxation of shares of stock as the property of shareholders, and which, by our laws, are wholly exempt, or taxed at lower rates, in the sense of the tax burden imposed. As a result, we must further hold, following the decisions of the Supreme Court of the United States as final authority, the shares of National banks in Montgomery are no longer subject to ad valorem taxation.—Ward v. First Nat. Bank of Hartford, MS; First National Bank v. Anderson, 269 U. S. 341, 70 L. Ed. 295; Mercantile Bank v. New York, 121 U. S. 138, 30 L. Ed. 895, 7 Sup. Ct. Rep. 826; New York v. Weaver, 100 U. S. 539, 25 L. Ed. 705; First Nat. Bank v. Chapman, 173 U. S. 205, 43 L. Ed. 669, 19 Sup. Ct. Rep. 205; First Nat. Bank v. Hartford, 273 U. S. 548, 71 L. Ed. 767; Minnesota v. First National Bank, 273 U. S. 561; 71 L. Ed. 774; Iowa-Des Moines Nat. Bank v. Bennett, (U. S.) 76 L. Ed. 164; Georgetown Nat. Bank v. McFarland, 273 U. S. 658, 71 L. Ed. 779, 47 Sup. Ct. Rep. 467.

We are brought, therefore, face to face with this proposition: When, by our system of laws, State and Federal, shares of National banks are taken without the body of taxable property on an ad valorem basis, are the shares of State banks still taxable on such basis?

The case of State Bank v. Board of Revenue, supra, answers this question in the negative.

The great Jurist who wrote that opinion, with his associates, as appears from decisions above reviewed, had [fol. 56] considered these questions for many years.

Following that decision our tax structure was so remodeled that for thirty years shares of stock in both State and National banks were effectively taxed, and, along with the shares in other corporations, contributed to the maintenance of the government whose benefits they shared. The basis of the decision was the application of the uniformity clauses of our own Constitution.

While recognizing the rule often declared that these provisions do not require that all property be taxed, do not inhibit exemptions, nor the selection of the subjects of taxations within the bounds declared, still two definite and unequivocal announcements are made as governing the taxation of the shares of State and National banks, viz: (1) "If a tax is imposed on any species of property, all prop-

erty belonging to that species must be taxed at the same rate." (2) "Bank shares in a National bank and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile."

It is suggested the case then being considered involved a statute taxing shares in State banks and shares in National banks on a different basis of value; that the exclusion of National bank shares under our present laws is due to the Federal law, and State is still free to tax the shares in banking corporations of its own creation. In last analysis this contention means no more than that shares in State banks and in National banks are not of the same class or [fol. 57] species of property within the meaning of our Constitution. This, in direct contradiction to the decision we are considering. If the state of the Federal law constitutes the one a different class, the court would have then said State banks have no concern with the taxation of National banks, the shares of the latter may be wholly exempt, and hence the imposition of a lesser tax is a matter of which State banks cannot complain.

Certainly "all property" of the same species cannot be taxed at the same rate, if a portion of such species is taxed on an ad valorem basis and the other is not taxed at all. Exemption and selection cannot strike down entirely the uniformity provisions of our Constitution.

It cannot be assumed that Chief Justice Stone did not take account of the fact that the restrictions upon the taxation of National bank shares were imposed by the Federal statute. He expressly refers to Section 5219, in force then as now, as enabling in character. While this is well recognized, still in fact, and as Judge Stone evidently viewed it, the Federal law recognizes shares in National banks as the rightful subject of State taxation.

They are private property enjoying all the benefits of State government as other property having a tax situs in the State. Of right, they should share in the support of that government. Congress, in recognition of this fact, says: "Nothing in this act" shall prevent such taxation, but it must be done without tax discrimination in favor of other moneyed capital. It is such discrimination, as con- [fol. 58] strued by Federal decisions, which has excluded

shares in National banks from the body of taxable property in the State. True, our legislature has manifested no purpose to tax shares in State banks and exempt shares in National banks. The statute purports to put them on the same footing, but the failure to tax other moneyed capital at the same rate, that is to say, impose a tax in some form substantially equal in the sense of the burden imposed, having regard to all the incidents and conditions which may rightfully enter into a scheme of taxation, has worked a release of National bank shares from ad valorem taxes.

We do not hesitate to say there is no semblance of justice in taxing the shares of State banks and excluding those of National banks. Such status is calculated to bring on a form of antagonism and rivalry between the two systems which may work injury to both.

We see no good reason to depart from the clearly expressed views of Judge Stone that both must be taxed alike or neither can be. Sections 211 and 217 of our Constitution, aimed at equality and justice in taxation, are to little effect, if one be taxed on an ad valorem basis and the other wholly relieved. This holding is forfeited by similar holdings in other States where the like question has arisen.—Voran v. Wright, (Kan.) 284 Pac. 807; Central National Bank v. Sutherland, (Neb.) 202 N. W. 428; Commercial State Bank v. Wilson, (S. D.) 220 N. W. 152; Security Savings Bank v. Board of Review, (Ia.) 178 N. W. 562.

The principle that where one species of property is taxed all property of that species must be taxed, and taxed at the same rate, is recognized by many decisions of our court.—[fol. 59] Western Union Telegraph Co. v. State Board of Assessment, 80 Ala. 280; Hooper v. The State, 141 Ala. 111; The State v. Alabama Fuel & Iron Co., 188 Ala. 487.

Strong insistence is made that such a rule puts the State in leading strings, subjects it to Federal power in shaping its own tax structure. Appellant relies upon our line of cases recognizing the right of the State to make classification for purposes of excise taxation, and to make exemptions and selections in matter of ad valorem taxes; calls attention to our tax upon the registration of mortgages and exemption of such loans from ad valorem taxes, treated in The State v. Alabama Fuel & Iron Co., supra; calls attention also to exemption of foreign securities upon payment

of a recording tax, upheld in Lee v. State Tax Commission, 219 Ala. 513, 123 So. 6.

The power of Congress to impose such restriction as may be deemed proper to prevent tax discrimination against shares in National banks is undoubted.

While our government is dual in character, consisting of Federal Laws and State Laws, within the scope of their respective powers, it is one government. The Federal law is the law of Alabama, just as the Acts of its Legislature. As for Section 5219 of Revised Statutes, the situation is not materially different from like provisions inserted in our own Constitution.

The insistence that the State's rightful power to shape its own taxing policies should be zealously guarded is of real moment.

[fol. 60] The co-operation of the Congress to that end is but to recognize the genius of our institutions. In general it may be said the decisions of the United States Supreme Court, in recognition of this vital interest of the States, construe their tax laws liberally when assailed as invasive of some provision of the Federal Constitution. See review of authorities in our recent case, State v. Anglo-Chilean Nitrate Sales Corporation, MS; also Ohio Oil Co. v. Conway, 281 U. S. 146.

If Section 5219, as now amended and as construed by the United States Supreme Court is not properly framed in this regard, the remedy lies with Congress. As clearly shown in State Bank v. Board of Revenue, supra, the right of State banks to have their shares placed in the same class or species as the shares of National banks is by force of our own Constitution, aimed at the same general principle of equality in tax burden as in the Federal statute.

Our State tax laws have in the main exempted moneyed capital, and shares of corporations operating on moneyed capital, from ad valorem taxation. That this class of property should bear its due share of the burdens of taxation would not seem to be matter of debate.

What is its due share, all things considered, and the manner of its imposition, are legislative problems.

Whatever aid we may render by a pertinent discussion of the principles involved, we conceive it our duty to give.

Assuming, then, that the legislative policy of retaining the shares of both State banks and National banks as tax-

[fol. 61] able property on an ad valorem basis in Alabama is to be adhered to, we here set out, for easy reference, Section 5219 of Revised Statutes as now amended by Acts of 1923 and 1926 (United States Statutes as Large, Part 2, Vol. 44, page 223) as follows:

" 'Sec. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

" '1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

" '(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

" '(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rates shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other

States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

[fol. 62] "'(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"'2. The shares of any national banking association owned by non-residents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non-resident shareholders.

"'3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

"'4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section'."

Since this court has held income to be property within the uniformity provisions of our Constitution, a tax on income except on an ad valorem basis at the same rate as other property, would call for an amendment to our State Constitution.

To meet the conditions of the Federal statute as to taxing shares of National banks, on an ad valorem basis, a like tax on the shares of corporations engaged in a competitive loan and investment business, is fully recognized by decision as well as indicated by the statute.

But this method of taxing moneyed capital of the individual employed in competition with National banks, or

where the loan and investment business of a corporation is incidental to and in connection with another main business, may not be desirable nor just.

[fol. 63] In this connection, we observe that the equality called for in the Federal statute does not require that every loan or investment of moneyed capital be taxed on an ad valorem basis. The Federal decisions draw a definite distinction between the capital and loans of a National bank and the shares of its capital stock. The value of the shares depends normally on the results of the business as a whole, the dividend or income it yields.

There would seem to be a reasonable workable relation between net income and the value of the property yielding the income that would afford a basis for taxation at substantially the same rate in the sense of burden imposed.

This court has in many well known decisions recognized in principle the legislative power to impose excise or privilege taxes on the basis of the value of such privilege, as measured by the volume or income from the business.

We see no reason, therefore, why a system of taxing moneyed capital may not be worked out on these lines, conforming to all the requirements of Federal law and our State Constitution in the matter of substantial equality. Surely there is crying need for a solution of these matters.

As matters now stand, we must hold the shares in appellee, State Bank, not subject to ad valorem taxation. This conclusion is based solely on the exclusion of shares of National banks by discrimination in favor of other moneyed capital in disregard of the restrictions of the Federal law.

Anderson, C. J., and Foster, J., concur in the foregoing dissent.

[fol. 64] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.